



**6712-01**

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 73**

**[MB Docket No. 13-236; FCC 16-116]**

**National Television Multiple Ownership Rule**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document eliminates the UHF discount from the calculation of the national television audience reach cap because it is no longer justified due to the transition to digital television. The discount attributes television stations broadcasting in the UHF spectrum with only 50 percent of the television households in their Designated Market Areas (DMAs). To avoid imposing undue harm on existing broadcast television station groups that exceed the national audience reach cap without the benefit of the UHF discount, this Report and Order grandfathers combinations: in existence on September 26, 2013 (Grandfather Date), the release date of the Notice of Proposed Rulemaking (NPRM) in this proceeding; created by a transaction that had received Commission approval on or before the Grandfather Date; and proposed in applications pending before the Commission on the Grandfather Date.

**DATES:** Effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Brendan Holland, Industry Analysis Division, Media Bureau, [Brendan.Holland@fcc.gov](mailto:Brendan.Holland@fcc.gov) (202) 418-2757.

**SUPPLEMENTARY INFORMATION:** This Report and Order in MB Docket No. 13-236 was adopted August 24, 2016, and released September 7, 2016. The full text of this document is

available for public inspection during regular business hours in the FCC Reference Center, 445 12<sup>th</sup> Street, SW., Room CY-A257, Washington, DC 20554, or online at <https://www.fcc.gov/ecfs/filing/0907563506002/document/090756350600263ba>. To request this document in accessible formats for people with disabilities (e.g. braille, large print, electronic files, audio format, etc.) or to request reasonable accommodations (e.g. accessible format documents, sign language interpreters, CART, etc.), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

### **Synopsis of the Report and Order**

1.     Background. Three decades ago in 1985, to protect localism, diversity, and competition, the Commission amended its national television multiple ownership rule to include a national audience reach cap that prohibited a single entity from owning television stations that collectively reached more than 25 percent of the total television households in the nation. At that time, the Commission recognized the inherent physical limitations of the UHF television band, finding that the strength of UHF television signals decreased more rapidly with distance in comparison to the signals of stations broadcasting in the VHF band, resulting in significantly smaller coverage areas and audience reach. This finding was significant because, at the time, the vast majority of viewers received programming from broadcast television stations via over-the-air signals. Thus, a smaller over-the-air signal made it harder for UHF stations to compete with incumbent VHF stations, which maintained greater coverage areas. To account for this coverage disparity, the Commission determined that licensees of UHF stations should be attributed with only 50 percent of the television households in their DMAs for purposes of calculating the national audience reach cap. This rule is termed the UHF discount.

2. As early as 1992, the Commission anticipated the possibility that the transition to digital television would obviate the need for the UHF discount, and sought comment on whether any distinction between UHF and VHF stations would be appropriate in light of the transition. A few years later, in the Telecommunications Act of 1996 (1996 Act), Congress directed the Commission to modify its ownership rules to increase the national audience reach cap from 25 percent to 35 percent of the total nationwide audience. In the 1996 Act Implementation Order (11 FCC Rcd 12374), the Commission noted that it was reviewing the UHF discount in the context of its television broadcast ownership rules, and explicitly cautioned that any entity that acquired stations during this interim period and complied with the 35 percent audience reach cap only by virtue of the UHF discount would be subject to the outcome of the pending rule making proceeding. In the 1998 Biennial Review Order (15 FCC Rcd 11058), the Commission retained the UHF discount, but stated that it would likely be unnecessary after the digital television transition and that the Commission would initiate a proceeding in the future to phase out the discount. In the 2002 Biennial Review Order (18 FCC Rcd 13620), the Commission raised the national audience reach cap to 45 percent and again concluded that, “the digital [television] transition [would] largely eliminate the technical basis for the UHF discount because UHF and VHF signals [would] be substantially equalized.” Therefore, the 2002 Biennial Review Order adopted rules to phase out the UHF discount for broadcast stations owned by the Big Four networks (ABC, CBS, NBC, and Fox) on a market-by-market basis at the time the markets transitioned to DTV. The Commission indicated further that, for networks and station groups other than those stations owned and operated by the Big Four networks, it would decide in a subsequent biennial ownership review whether to extend the sunset to all other networks and

station group owners. The rules at that time contemplated a gradual, market-by-market transition to DTV, but this approach was later replaced by a hard deadline – June 12, 2009.

3. Following adoption of the 2002 Biennial Review Order, Congress subsequently rolled back the 45 percent national audience reach cap by including a provision in the 2004 Consolidated Appropriations Act (CAA) directing the Commission to set the cap at 39 percent of national television households. The CAA further amended section 202(h) of the 1996 Act to require a quadrennial review of the Commission's broadcast ownership rules rather than the previously mandated biennial review. In doing so, Congress removed the requirement to review any rules relating to the 39 percent national audience reach cap from the quadrennial review requirement. The CAA did not mention the UHF discount, nor did it address the potential impact of the DTV transition on the calculation of the national audience reach cap.

4. Prior to the enactment of the CAA, several parties had appealed the Commission's 2002 Biennial Review Order to the U.S. Court of Appeals for the Third Circuit (Third Circuit). In June 2004, the Third Circuit found, among other things, that the CAA rendered moot the challenges to the Commission's decision to retain the UHF discount (373 F.3d 372). The court further found that the CAA insulated the national audience reach cap, including the UHF discount, from the Commission's quadrennial review of its media ownership rules. At the same time, however, the court stated that its decision did not foreclose the Commission's consideration of the UHF discount in a rulemaking separate from the required quadrennial review of its ownership rules. The court concluded that, barring congressional intervention, the Commission could decide the scope of its authority to modify or eliminate the UHF discount outside the context of section 202(h). Prior to the court's decision, in February 2004, the Media Bureau issued a Public Notice specifically seeking comment on the Commission's authority to

modify or eliminate the UHF discount in light of the CAA. In particular, the Media Bureau sought comment on whether the passage of the 39 percent cap signified congressional approval, adoption, or ratification of the 50 percent UHF discount. The comments and replies were filed in the docket for the 2002 Biennial Review Order.

5. In July 2006, the Commission issued a Further Notice of Proposed Rulemaking (FNPRM) as part of its 2006 quadrennial review of the media ownership rules (21 FCC Rcd 8834). Among other things, the FNPRM sought comment on the UHF discount rule in light of the Third Circuit's holding and queried whether the Commission should retain, modify, or eliminate the UHF discount. Comments filed in response to the FNPRM also refreshed the Commission's record on its authority to alter the UHF discount. In February 2008, the Commission concluded in the 2006 Quadrennial Review Order (23 FCC Rcd 2010) that the UHF discount was insulated from review under section 202(h) as a result of the CAA, and thus beyond the parameters of the quadrennial review. But the Commission noted that the Third Circuit's 2004 decision had left it to the Commission to decide the scope of its authority to modify or eliminate the UHF discount outside the context of section 202(h). Accordingly, the Commission indicated that it would address the petitions, comments, and replies filed with respect to the alteration, retention, or elimination of the UHF discount in a separate proceeding, which would be commenced at a future date.

6. Since June 13, 2009, all full-power television stations have broadcast their over-the-air signals exclusively in digital form. The DTV transition has enabled broadcasters to provide multiple programming choices, higher quality video, and enhanced capabilities to consumers. Yet the transition has posed more challenges for VHF channels than UHF channels because VHF spectrum has proven to have characteristics that make it less desirable for

providing digital television service. For instance, nearby electrical devices tend to emit noise that can cause interference to DTV signals within the VHF band, creating reception difficulties in urban areas even a short distance from the TV transmitter. The reception of VHF signals also requires physically larger antennas compared to UHF signals. For these reasons, among others, television broadcasters generally have faced greater challenges providing consistent reception on VHF signals than UHF signals in the digital environment, and some station owners have therefore opted to migrate their signals from VHF to UHF. Therefore, on September 26, 2013, the Commission issued the NPRM in this proceeding proposing to eliminate the UHF discount and grandfather certain existing television station combinations that would exceed the 39 percent national audience reach cap in the absence of the discount, and seeking comment on whether a VHF discount should be adopted (28 FCC Rcd 14324).

7. Authority to Modify the UHF Discount. We conclude that the Commission has the authority to modify the national audience reach cap, including the authority to revise or eliminate the UHF discount. We find that no statute bars the Commission from revisiting the cap or the UHF discount in a rulemaking proceeding so long as such a review is conducted separately from a quadrennial review of the broadcast ownership rules pursuant to section 202(h) of the 1996 Act. The CAA removed the requirement to review the national ownership cap from the Commission's quadrennial review requirement, but did not impose a statutory national audience reach cap or prohibit the Commission from evaluating the elements of this rule. While the CAA also provides that the Commission may not apply its forbearance authority under Section 10 of the Communications Act to any person or entity exceeding the 39 percent national audience reach cap, there is nothing in the CAA that suggests Congress intended to prevent the Commission from tightening the cap, repealing the UHF discount, or otherwise changing its

rules at a later date. Thus, the Commission retains authority under the Communications Act to review any aspect of the national audience reach cap; it simply is not required to do so as part of the quadrennial review.

8. Specifically, the Communications Act gives the Commission the statutory authority to revisit its own rules and revise or eliminate them when it concludes such action is appropriate. The Act authorizes the agency to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” Similarly, section 303(r) provides that the Commission may “[m]ake such rules and regulations. . . not inconsistent with this law, as may be necessary to carry out the provisions of this Act. . . .” Indeed, courts have held that the Commission has an affirmative obligation to reexamine its rules over time. In Bechtel v. FCC (957 F.2d 873), the court observed that “changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so. In the rulemaking context, an agency also may be obligated to reexamine its approach if a significant factual predicate of a prior decision has been removed.” As we explain further below, this is precisely the case in this instance.

9. With respect to the UHF discount, even those advocating retention of the discount based on the CAA acknowledge that the CAA does not even mention the UHF discount. We disagree with commenters’ suggestion that the CAA’s legislative history somehow supports a conclusion that Congress fully considered either the UHF discount or the effect of the – then future – DTV transition. The history of this immense, omnibus bill does not reflect any consideration of the UHF discount or its potential elimination. There is no basis for the assumption that Congress, in overruling the Commission’s decision to raise the national audience

reach cap to 45 percent and mandating it be moved back down to 39 percent, did so with the expectation that the Commission would indefinitely maintain the UHF discount, especially given that post-DTV transition there is no technological basis for the discount. We note further that, when Congress chose to supersede the Commission's action and revise the national audience reach cap down to 39 percent, it was on notice of the Commission's intent to phase out the discount, which the Commission had expressed in 1998 and again in 2002. Congress was also aware, of course, of the Commission's broad authority – indeed, its obligation – to reevaluate its rules periodically and revise any that no longer serve the public interest. It could have foreclosed the Commission from ever revising the national audience reach cap or the UHF discount by making the national cap and the UHF discount a statutory restriction or by otherwise withdrawing Commission authority to modify the cap or the UHF discount. It did not do so, opting instead for the limited measure that reduced the cap from 45 percent to 39 percent and relieved the Commission of the obligation to reevaluate the national audience reach cap in the mandated quadrennial ownership review.

10. We agree with commenters who assert that these actions suggest Congress's intent was to prevent excessive consolidation in the broadcast market. In fact, as discussed below, operation of the analog-era discount after the DTV transition effectively allows some broadcasters with UHF stations to reach far more than the 45 percent of the national audience that Congress thought too high.

11. Our interpretation of the CAA is consistent with the conclusion of the Third Circuit. As the court explained, although Congress excluded the national audience reach cap from the quadrennial review requirement under section 202(h), it did not foreclose Commission action to review or modify the UHF discount in a separate context.



12. Elimination of the UHF Discount. As in the NPRM, we conclude that television broadcasting in the UHF band is no longer technically inferior to operations in the VHF band. UHF stations no longer suffer from weaker signals and smaller audience reach, are less dependent today on over-the-air coverage, are more desirable than VHF stations for digital broadcasting, and therefore UHF station owners no longer need the UHF discount to remain viable and competitive. Commenters in this proceeding have not presented evidence of any existing technical limitations that render digital UHF stations inferior to digital VHF stations.

13. Therefore, we find that the DTV transition has rendered the UHF discount technically obsolete, and we eliminate it from the calculation of the national audience reach cap. As a result of the DTV transition, the national cap is effectively 78 percent for a station group that includes only UHF stations, and for any station group that includes a UHF station, the effective national cap now exceeds the 39 percent level that Congress directed the Commission to establish. Rather than offsetting an actual service limitation or reflecting a disparity in signal coverage, the UHF discount serves only to confer a factually unwarranted benefit on owners of UHF television stations that undermines the purpose of the national audience reach cap. Furthermore, the Commission's ongoing experience reviewing media transactions after the DTV transition date indicates that failure to correct the distortion that the UHF discount causes in the calculation of national audience reach as a result of the DTV transition creates an ongoing potential that additional transactions could undermine the national audience reach cap.

14. At the time the UHF discount was established, analog UHF television stations were demonstrably inferior to VHF stations, with weaker signals and a smaller audience reach. Thirty years after its adoption, however, it is clear that the UHF discount cannot be justified in the digital world. While the discount was needed in the mid-1980s, the Commission soon found

that the disparity between analog UHF and VHF stations was unlikely to exist in perpetuity. Further, three decades ago roughly 60 percent of U.S. television households received programming exclusively over-the air, while according to the most recent Nielsen data, approximately 11.5 percent, or about 13.3 million television households, are broadcast-only.

15. As early as 1988, the Commission noted that the disparities between UHF and VHF services had begun to decrease. Further, as the disparity between the two services eroded during the 1980s and 1990s, the Commission repealed a number of rules and policies that had previously treated UHF stations differently, and occasionally more favorably, than their VHF counterparts. In 1988 the Commission eliminated the UHF Impact Policy, which limited approval of new or modifications to existing VHF stations if the approval would harm existing or potential UHF stations (3 FCC Rcd 638). In 1995, the Commission repealed both the Prime Time Access Rule, which prohibited network-affiliated television stations in the top 50 markets from broadcasting more than three hours of network programs during prime time (11 FCC Rcd 546), and the Secondary Affiliation Rule, which required a third network seeking an affiliate in a market to offer its programming first to the independent station, often a UHF station (10 FCC Rcd 4538). By the mid-1990s, the Commission went so far as to note that the disparities between UHF and VHF stations had been largely ameliorated and the ability of UHF stations to compete against VHF stations had greatly improved (11 FCC Rcd 19949).

16. The most important change, however, occurred with the DTV transition, which the Commission had long recognized would likely eliminate the inferiority of UHF channels. In the 1998 Biennial Review Order, even though the Commission ultimately decided to retain the discount because the digital television transition was not yet complete, it indicated that the discount's days were numbered. The Commission discussed at length its expectation that the

transition to digital broadcasting would potentially “rectify the UHF/VHF disparity” and that “the eventual modification or elimination of the discount for DTV [would] be appropriate.” In the subsequent 2002 Biennial Review Order, the Commission determined that the issue was ripe and that the forthcoming DTV transition would substantially equalize UHF and VHF signals. The DTV transition has borne out the Commission’s expectation.

17. UHF spectrum is now highly desirable in light of its superior propagation characteristics for digital television. Since the 2009 DTV transition, 74 percent of the nation’s television stations are now operating on UHF channels, and 80 percent of the aggregate television viewing population is served by UHF stations. As a result of the DTV transition, the number of UHF stations increased by 221 stations and the number of VHF stations decreased by 204 stations, indicating that over 200 stations, or approximately 15 percent of the total number of commercial television stations, switched spectrum bands in favor of UHF. In April 2010, Broadcasting & Cable noted that following the June 2009 DTV transition, the majority of U.S. TV stations had moved to UHF channels, which are better suited to broadcasting digital television at lower power level. Notably, the DTV transition preserved station coverage, and in many cases, allowed stations to improve coverage by upgrading their facilities, maximizing power, and capitalizing on improved propagation of digital television signals. Therefore, stations have enhanced their coverage and audience reach as a result of the DTV transition, both because of the technical superiority of digital broadcasts on UHF channels and as a result of the chance to maximize their signal coverage during the transition. The evidence clearly establishes that digital UHF operations do not suffer from the same technical limitations as analog UHF operations. This finding is consistent with past Commission decisions scrutinizing the necessity

of the UHF discount and recognizing the increased economic viability and success of the UHF band.

18. Simply put, the UHF discount does not appropriately reflect the technical and economic reality of UHF facilities today. In fact, the discount impedes the objectives of the national audience reach cap by effectively expanding the 39 percent cap beyond even the level that Congress determined was too high when it enacted the CCA. Continued application of the UHF discount seven years after the DTV transition has the absurd result of stretching the national audience reach cap to allow a station group broadcasting exclusively on UHF channels to actually reach up to 78 percent of television households, dramatically raising the number of viewers that a station group can reach and thwarting the intent of the cap.

19. While the discount was intended to make the calculation of an owner's audience reach better reflect the reality of the audience the stations actually reached, in current circumstances, applying the discount creates a loophole that allows owners to fail to count audience that the stations actually do reach. Continued application of the antiquated UHF discount now has the unintended consequence of significantly discounting a station's actual audience reach for purposes of the rule when in reality the station's audience reach is not diminished at all by the use of UHF technology, but rather improved.

20. Additionally, during the DTV transition, many stations that were broadcasting on VHF channels at the time the 39 percent cap was instituted shifted to UHF channels. Even after the transition, a number of stations that initially elected to operate on a VHF channel sought to relocate to a UHF channel to resolve technical difficulties encountered in broadcasting digitally on a VHF channel. Despite having signal coverage that was equal to, or even better than, its previous VHF channel, the former VHF station now received – for the first time – the benefit of

the UHF discount, i.e., a 50 percent reduction in the audience reach attributed to the station, all based on a discount intended to offset the inferiority of analog UHF signals. For instance, a licensee that traded an analog VHF station for a digital UHF station would now appear to have room to acquire additional stations under the 39 percent cap simply by virtue of having changed spectrum, even though the number of stations owned by the licensee and the audience reached by those stations remained the same. Such a result serves as an unwarranted windfall for stations that migrated from VHF to UHF in the DTV transition, in light of the general technical superiority of the digital UHF channels.

21. For example, in 2009, just prior to the DTV transition, Fox owned 27 stations with a total national audience reach of 37.22 percent before application of the UHF discount and 31.20 percent after application of the UHF discount. In 2010, immediately after the DTV transition, Fox continued to own 27 stations with a total national audience reach of 37.10 percent before application of the UHF discount. However, because five of Fox's stations switched from analog VHF channels to digital UHF channels in the transition, Fox's national audience reach calculation suddenly decreased with the benefit of the UHF discount, which allowed the station group to calculate its audience reach as only 24.75 percent – despite the fact that Fox still owned the same number of stations in the same markets reaching the same audiences. Although only five of Fox's stations switched from analog VHF to digital UHF channels in the DTV transition, these stations were all located in the top 10 DMAs, which account for a significant percentage of the television households in the nation. As a result, reducing the national audience reach by 50 percent for just a handful of stations in these larger markets had the effect of greatly reducing Fox's national audience reach calculation and potentially allowing significant additional

consolidation, although it had no effect on its actual national audience reach. This example demonstrates the absurd results created by the continued existence of the discount.

22. We do not agree with commenters arguing that, apart from technical considerations, the discount remains necessary to promote competition, localism, and diversity, help non-network broadcast groups compete with stations owned and operated by the major broadcast networks, and foster the creation of new networks. Further, contrary to claims of some commenters, the Commission's decision in the 2002 Biennial Review Order to continue the UHF discount for stations not owned and operated by the Big Four networks was not based on a finding that such stations continued suffering from economic handicaps. The Commission clearly articulated that the UHF discount was predicated on the competitive disparity arising from the technical differences between the two types of channels, and merely deferred a decision on eliminating the discount. Any competitive disparity between UHF and VHF flowed from the technological disparity.

23. As we have detailed above, following the transition to DTV, stations broadcasting on UHF spectrum are no longer competitively disadvantaged as compared to stations broadcasting on VHF spectrum. The record does not reflect evidence of any existing competitive disparity resulting from the continued deficiency of UHF signals. For example, no party has proffered evidence that advertisers routinely discount the prices paid for advertising on UHF stations versus VHF stations, as commenters alleged in the 2002 biennial review proceeding. Thus, we find no evidence that UHF stations today face a competitive disparity vis-à-vis VHF stations. In fact, as we note above, a number of former analog VHF stations chose to switch to UHF channels, further belying the suggestion that a competitive disparity persists between the two types of channels. We note further that the Commission has eliminated

previously the historic steep discount in annual regulatory fees assessed for UHF stations, combining UHF and VHF stations into a single fee category beginning in Fiscal Year 2014, thereby eliminating a distinction based on the historical disadvantages of UHF.

24. Of course, this is not to say that all stations are now competitive equals. Disparities continue to exist between stations in terms of viewership, advertising revenue, retransmission consent fees, and programming, to name a few. But these competitive disparities are not the result of any current technical differences between UHF and VHF stations. Because UHF stations are no longer technologically disadvantaged, they can now compete effectively in a market with VHF stations. Disparities between stations today are the result of market competition, programming choices, network affiliation, and capitalization. We do not believe that retention of the UHF discount would resolve any of these competitive differences. Finally, we disagree with any claim that removing the discount would frustrate the original purpose of the national cap; instead, removing the discount will prevent networks from expanding their reach, and our grandfathering regime, discussed below, will ensure that broadcasters that otherwise would exceed the cap after the discount is eliminated – none of which are the Big Four networks – will be grandfathered.

25. Further, when the Commission stated in the 2002 Biennial Review Order that the UHF discount continues to be necessary to promote entry and competition among broadcast networks, the DTV transition was still a number of years in the future. Contrary to the Commission's observations nearly a decade and a half ago, we do not see that the UHF discount is leading to the creation of new broadcast networks today. The record contains no evidence that new broadcast networks are being built today by assembling a national station group of UHF broadcast stations. Similarly, our most recent annual report on the state of competition among

video providers does not reflect a trend of emerging UHF broadcast networks. Instead, it appears that new programming networks are emerging as cable networks, online video programmers, and multi-cast digital networks – methods that do not rely on the UHF discount. Therefore, the record in this proceeding does not support a conclusion that perpetuation of the UHF discount would foster the creation of new broadcast networks.

26. We do not agree with commenters claiming that eliminating the UHF discount also requires an examination of the national audience reach cap. Reexamining the cap is not within the scope of the NPRM, and we decline to initiate a further rulemaking proceeding at this time for that purpose. No party has presented persuasive reasons for revisiting the national cap at this time, and doing so would be far more complex than the decision to eliminate the UHF discount, which we conclude clearly lacks any remaining justification. Initiating a new rulemaking proceeding to undertake a complex review of the public interest basis for the national cap, which is the media ownership limit that Congress examined most recently, would only delay the correction of audience reach calculations necessitated by the DTV transition. Delay would unnecessarily complicate efforts to bring the cap back into alignment with its stated level as broadcasters continue to increase their reach. Continued application of the discount absent its technical justification simply distorts the operation of the national audience reach cap by exempting the portions of the audience that are receiving a signal from being counted and allowing licensees that operate on UHF channels to reach more than 39 percent of viewers nationwide. Removal of the analog-era discount thus maintains the efficacy of the national cap. Although we do not foreclose the possibility of examining the national audience reach cap in the future, we find that action now to address the effects of the DTV transition by eliminating the UHF discount is appropriate.



27. In this regard, our elimination of the UHF discount is unlike our adoption of the attribution rule for television joint sales agreements (TV JSAs), which the Third Circuit, in its recent ruling in connection with our quadrennial review of the multiple ownership rules, held was contrary to our periodic review obligation under section 202(h) (824 F.3d 33). (“[T]he Commission cannot expand its attribution policies for an ownership rule to which § 202(h) applies unless it has, within the previous four years, fulfilled its obligation to review that rule and determine whether it is in the public interest.”) The Local TV ownership rule clearly is subject to periodic review under section 202(h), whereas the national television ownership cap is not subject to that obligation. In addition, unlike our initial action on TV JSAs, we are grandfathering station groups that will exceed the national cap after we eliminate the UHF discount, so elimination of the UHF discount will not require divestitures by station owners. Finally, as discussed above, retention of the UHF discount is indefensible, regardless of the level of the cap, because it is irrational in light of the digital transition. Therefore, we reject the recent contentions of the National Association of Broadcasters and Fox that the Third Circuit’s recent decision supports a conclusion that we cannot eliminate the UHF discount separately from a review of the national audience reach cap.

28. Grandfathering Existing Broadcast Station Combinations. We adopt the proposal for grandfathering reflected in the NPRM. Specifically, we grandfather broadcast station ownership groups that would exceed the 39 percent national audience reach cap as a result of the elimination of the UHF discount as of September 26, 2013, the date of the NPRM. As further proposed, we also grandfather proposed station combinations for which an assignment or transfer application was pending with the Commission or that were part of a transaction that had received Commission approval as of that date if such station groups would otherwise exceed the cap. We

require any grandfathered ownership combination subsequently assigned or transferred to comply with the national audience reach cap in existence at the time of the transfer of control or assignment of license. We find that these provisions provide an appropriate balance between the valid expectations of broadcast station ownership groups who exceed the cap solely as a result of the elimination of the UHF discount and the goals and purposes of the 39 percent national audience reach cap. For this reason, we refuse to adopt a more limited grandfathering regimen or no grandfathering provision whatsoever, as urged by some commenters.

29. No broadcasters will exceed the national cap following the elimination of the UHF discount with a combination that will not be fully grandfathered by this decision. No broadcast transactions since the release of the NPRM have resulted in an entity exceeding the national ownership cap. Thus, as a practical matter, there is no actual difference in grandfathering as of the date of the NPRM or the date of this Report and Order. Despite one commenter's claims, the Commission has continued to evaluate and approve broadcast transaction applications during the pendency of this proceeding. The grandfathering proposal adopted today protects the existing ownership structure as of the release of this Report and Order for all broadcast television station groups that will exceed the national audience reach cap upon the elimination of the UHF discount. Given the long history of notice that the UHF discount would be eliminated following the DTV transition and the potential for significant distortion of the national audience reach cap – indeed, the potential to double the national cap – the decision to use the date of the NPRM as the grandfathering date is fully supported and best serves the public interest.

30. Grandfathering as of the date of the NPRM is consistent with previous Commission decisions. For example, the grandfathering of interests in connection with the

Commission's equity/debt plus rule and the attribution of Local Marketing Agreements (LMAs) each used the date of the notice in those proceedings as the cut-off date (14 FCC Rcd 12559 and 14 FCC Rcd 12903). Therefore, the Commission is not persuaded to designate the adoption date of this Report and Order as the grandfathering date for the UHF discount as some commenters request. Proposing such a grandfathering date would have provided an incentive to broadcasters to rush to engage in new transactions that could have diluted the effectiveness of the Commission's action to preserve the national audience reach cap by eliminating the outdated and technically unsupported UHF discount, perpetuating the distortive effect of this anachronistic regulation.

31. Further, this grandfathering date does not disrupt expectations because the industry has been on notice for at least 20 years that the UHF discount would likely be eliminated following the transition to DTV. The Commission further stated in the 1998 Biennial Review Order that it expected to eliminate the UHF discount after completion of the DTV transition. The Commission, in fact, had previously decided to phase out the UHF discount, although that phase-out was rendered moot by congressional action. The grandfathering proposal adopted today ensures that, going forward, the national audience reach of broadcast station groups is reflected accurately in the broadcast television market while not penalizing those station groups which exceed the national audience reach cap solely as a result of eliminating the UHF discount.

32. The grandfathering mechanism adopted here does not make the decision to eliminate the UHF discount retroactive. This action does not alter the past lawfulness of station combinations, does not impose any liability for having assembled station groups that would be prohibited going forward, and does not introduce any retrospective obligations for past conduct.

As noted above, by grandfathering existing station groups that would exceed the national audience reach cap without the continued benefit of the UHF discount as of the date of the NPRM, we protect all existing broadcast television station ownership combinations that would otherwise exceed the cap from the future effect of this change, even though application of the revised rule to them would not be considered retroactive.

33. While some commenters urge adoption of permanent grandfathering of station groups that resulted in the creation of a new broadcast network, the Commission concludes that its decision not to allow the transferability of grandfathering is fully consistent with prior Commission practice regarding grandfathering; for example, the 1999 Local TV Ownership Order (14 FCC Rcd 12903) and the 2014 Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions Order (29 FCC Rcd 6567). This approach strikes the appropriate balance between avoiding imposition of the hardship of divestiture on owners of existing station combinations who have long owned the combination in reliance on the rules, and moving the industry toward compliance with current rules when owners voluntarily decide to sell their stations. The grandfathering rule adopted preserves several existing combinations that resulted in new broadcast networks. Networks continue to exist with owned and operated station groups that comply with the national audience reach cap, or which are far below the nearly 65 percent nationwide coverage reached by one grandfathered station group. In addition, even if the Commission permitted a grandfathered station group to be transferred intact, there would be no obligation for the new buyer to maintain the stations' current network affiliation or the programming aired by the current licensee. Thus, we conclude that the public interest would not be served by allowing grandfathered combinations to be freely transferable in perpetuity where a

combination does not comply with the national audience reach cap at the time of transfer or assignment simply because the combination once resulted in a new network.

34. Finally, we find that the record does not support one commenters' request that the Commission fashion a specific waiver standard for violations of the national audience reach cap that result from elimination of the UHF discount. Parties may always petition the Commission for a waiver under our existing rules if they believe unique circumstances warrant a waiver in a particular case. However, we expect such circumstances to be rare and isolated given that only a few existing broadcast television station ownership groups will exceed the cap after elimination of the discount. Ultimately, there are many different ways to structure an assignment or transfer of control that may present varying levels of concern regarding the potential impact of a proposed transaction. Given the fact-specific nature of our review of such transactions, a specific waiver standard is not appropriate. Instead, we conclude that a case-by-case approach will best serve the public interest by allowing the Commission to consider the unique circumstances of any proposed transaction involving grandfathered combinations and its potential impact on competition.

35. VHF Discount. We disagree with commenters claiming that eliminating the UHF discount also requires the concurrent adoption of a VHF discount. As noted above, the DTV transition has made UHF spectrum generally more desirable than VHF spectrum for purposes of digital television broadcasting. Yet, despite the challenges to the digital VHF band, the current record does not demonstrate that digital television operations in the VHF band are universally technically inferior to operations in the UHF band in a manner or to a degree that would warrant a discount. The record does not provide clear evidence that digital VHF stations consistently suffer from significant technical disadvantages in audience coverage sufficient to justify

adoption of a discount. Further, the record lacks evidence that the economic viability of VHF stations would be threatened without a discount. Moreover, the Commission has already taken steps to assist individual VHF stations in addressing technical concerns. Accordingly, we decline to adopt a VHF discount at this time.

36. Procedural Matters. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this Report and Order in MB Docket No. 13-236, which is summarized below.

37. This Report and Order does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.

38. Final Regulatory Flexibility Analysis. The Regulatory Flexibility Act (RFA) directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in the Report and Order. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

39. Television Broadcasting. The SBA designates television broadcasting stations with \$38.5 million or less in annual receipts as small businesses. Television broadcasting includes establishments primarily engaged in broadcasting images together with sound. These

establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The Commission estimates that there are 1,387 licensed commercial television stations in the United States. In addition, according to Commission staff review of the BIA/Kelsey Media Access Pro Television Database as of March 25, 2016, 1,264 (or about 91 percent) of the estimated 1,387 commercial television stations have revenues of \$38.5 million or less and, thus, qualify as small entities under the SBA definition. We therefore estimate that the majority of commercial television broadcasters are small entities. The Commission has also estimated the number of licensed noncommercial educational (NCE) television stations to be 390. These stations are non-profit, and therefore considered to be small entities.

40. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of small business is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

41. The Report and Order modifies the calculations underlying the national television multiple ownership rule as set forth above, which would affect reporting, recordkeeping, or other compliance requirements. The conclusion modifies several FCC forms and their instructions: (1) FCC Form 301, Application for Construction Permit for Commercial Broadcast Station; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 315, Application for Consent to Transfer Control of Corporation Holding Broadcast Station Construction Permit or License. The Commission may have to modify other forms that include in their instructions the media ownership rules or citations to media ownership proceedings, including Form 303-S and Form 323. The impact of these changes will be the same on all entities, and we do not anticipate that compliance will require the expenditure of any additional resources as the proposed modification to the calculations underlying the national television multiple ownership rule will not place any additional obligations on small businesses.

42. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. The NPRM invited comment on issues that had the potential to have significant impact on some small entities.

43. The rule change adopted in this Report and Order, as set forth above, is intended to achieve our public interest goal of competition. By recognizing the technical advancements of



the UHF band after the DTV transition, this Report and Order seeks to create a regulatory landscape that reflects the current value of UHF spectrum in order to better assess national television ownership figures. Further, this Report and Order complies with the President's directive for independent agencies to review their existing regulations to determine whether such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. By eliminating an outdated rule, we seek to reduce the costs and burdens of compliance on firms generally, including small business entities. And we find that the benefits of our decision to eliminate the UHF discount outweigh any costs or other burdens that may result from our action. In addition, the grandfathering proposal the Commission adopts in the Report and Order aims to create a more effective regulatory landscape by addressing current market realities. Overall, this Report and Order seeks to expand broadcast ownership opportunities for station owners, which includes small entities, by accurately reflecting broadcast television ownership in the digital age. Given that the technical justification for the UHF discount no longer exists, continued application of the discount stifles competition by encouraging consolidation instead of promoting new entrants in local broadcast television markets. Therefore, the Commission believes the rule change adopted in this Report and Order will benefit small entities, not burden them.

44. Ordering Clauses. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2(a), 4(i), 303(r), 307, 309, and 310 of the Communications Act of 1934, as amended, this Report and Order IS ADOPTED. The rule modification below shall be effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Report and Order to Congress and to the Government Accountability Office pursuant to the Congressional Review Act.

List of Subjects in 47 CFR Part 73

Television, Radio.

**FEDERAL COMMUNICATIONS COMMISSION**

Gloria J. Miles,  
Federal Register Liaison Officer.  
Office of the Secretary.

For the reasons discussed in the preamble, The Federal Communication Commission amends 47 CFR part 73 as follows:

**PART 73 – RADIO BROADCAST SERVICES**

1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336, and 339.

2. Amend § 73.3555 by revising paragraphs (e)(1) and (e)(2)(i) to read as follows:

**§ 73.3555 Multiple ownership.**

\* \* \* \* \*

(e) \* \* \*

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners,

members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(2) \* \* \*

(i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license.

\* \* \* \* \*

[FR Doc. 2016-25569 Filed: 10/21/2016 8:45 am; Publication Date: 10/24/2016]